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No. 02-575

IN THE

Supreme Court of the United States

NIKE, INC., ET AL.,
Petitioners,

v.

MARC KASKY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Motion for Leave to File *Amicus Curiae* Brief and Brief for Amicus Curiae The Center for the Advancement of Capitalism In Support of Petitioners

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Motion for Leave to File *Amicus Curiae* Brief

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, the Center for the Advancement of Capitalism ("CAC") hereby requests leave to file the accompanying *amicus curiae* brief. Such brief is submitted in support of granting the petition for a writ of certiorari.

Counsel for petitioners has consented to the filing of this brief. Counsel for respondent Marc Kasky has not consented.

As set forth in the accompanying brief, CAC is a nonprofit corporation that seeks to present to policymakers, the judiciary and the public analyses to assist in the identification and protection of the individual rights of the American people. CAC has an interest in matters affecting the economic rights of corporations and individuals, and has previously filed comment letters and *amicus curiae* briefs with federal courts.

The instant case involves a matter fundamental to the protection of individual rights and capitalism. The decision

below effectively denies Nike the full exercise of its rights under the First Amendment.

CAC believes that the decision below, if affirmed, will have a chilling effect on the exercise of fundamental rights held by all Americans, whether acting as individuals or agents of corporations. Because there are additional issues not addressed in the petition that this Court should consider, CAC respectfully requests leave to file the accompanying brief containing discussion of two additional issues.

Respectfully submitted,

THOMAS A. BOWDEN
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INTEREST OF AMICUS CURIAE[1]

The Center for the Advancement of Capitalism ("CAC") is a District of Columbia corporation organized in 1998, and exempt from income tax under Section 501(c)(4) of the Internal Revenue Code. CAC's mission is to present to policymakers, the judiciary and the public analyses to assist in the identification and protection of the individual rights of the American people. CAC applies Ayn Rand's philosophy of Objectivism to contemporary public policy issues, and provides empirical studies and theoretical commentaries on the impact of legal and regulatory institutions upon the rights of American citizens.

The instant case raises a number of issues relevant to CAC's work, notably the scope of First Amendment

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

protection afforded corporate speech. Because the petitioners, however, declined to raise three issues directly arising from the decision below, *amicus* would ask the Court to consider these issues in addition to the two questions presented in the petition for certiorari.

SUMMARY OF ARGUMENT

The petition for certiorari correctly identifies two questions for this Court to review. In addition, *amicus* would draw the Court's attention to two additional issues that warrant granting the writ and ultimately reversing the decision below.

Nike focuses on whether the commercial speech doctrine is correctly applied in this case. But beyond applicability, the Court should also consider whether the doctrine itself remains good law. The recent case history of the commercial speech doctrine shows this Court has yet to establish an objective standard that lower courts and citizens can safely rely upon to separate "commercial" and "noncommercial" speech. In the absence of an objective standard, the door has opened to various claims that have nothing to do with preventing fraud or advancing some other legitimate government interest. This case is a perfect example. Marc Kasky is not attempting to redress consumer fraud or advance a proper governmental objective. He is using the judiciary to sanction a company whose labor practices he dislikes and whose public comments he wishes to silence. Kasky's suit against Nike goes far beyond the original, narrow scope of the commercial speech doctrine first articulated sixty years ago in *Valentine v. Chrestensen*.[2]

In expanding the commercial speech doctrine, this Court has sought to completely separate and isolate commercial speech from noncommercial speech. But such a separation serves no identifiable governmental interest, and the confusion arising from the Court's uncertainty in

[2] 316 U.S. 52 (1942).

defining the difference opened the door for the decision below. The California Supreme Court essentially held that a speaker's economic motivation is sufficient to trigger regulation under the commercial speech doctrine, and in the absence of clear guidance from this Court, that interpretation is not wholly inconsistent with *Central Hudson v. Public Service Commission*[3] and *Bolger v. Youngs Drug Products Corp.*[4] Unless this Court reconsiders and overrules the modern commercial speech doctrine articulated in those cases, the "economic motivation" standard will likely become the governing philosophy in the lower courts and among state legislatures. This would be a serious error, for such a standard would have a chilling effect on business and individual rights, and far exceed any legitimate government objective.

The second issue not addressed by the petition or the decision below is Kasky's standing. While California law does permit Kasky to initiate a "private attorney general" action on behalf of the general public, this construction of standing violates Article IV of the federal Constitution, which requires all states to maintain a "republican form of government." In permitting Marc Kasky to exercise the state's monopoly on the use of force, the California legislature violated its obligation to maintain a republican form of government. Consequently, this Court should hold that the provision of CAL. BUS. & PROF. § 17204 permitting private attorney general actions is unconstitutional.

ARGUMENT

I. The Court Should Grant Certiorari to Reconsider the Commercial Speech Doctrine Set Forth in *Central Hudson* and *Bolger*.

[3] 447 U.S. 557 (1980).
[4] 463 U.S. 60 (1983).

Nike argues that the commercial speech doctrine does not apply to this case, but it does not directly address the validity of the doctrine itself. It would be a mistake for the Court to take such a narrow approach. Given the nearly sixty years of confusion the commercial speech doctrine has generated within the judiciary and the general public, this case presents an excellent opportunity for the Court to decisively settle the issue.

a. *The original commercial speech doctrine, as briefly stated in* Valentine v. Chrestensen, *provides the appropriate standard of review.*

Circuit Judge Alex Kozinski aptly describes the moment of Creation: "In 1942, the Supreme Court plucked the commercial speech doctrine out of thin air."[5] That year, the Court decided *Valentine v. Chrestensen*[6], a case arising under New York's Sanitary Code. To circumvent the code's ban on distributing commercial handbills on public streets, respondent Chrestensen produced two-sided handbills, one side inviting would-be patrons to tour his submarine, and the other "a protest against the City Dock Department's refusal to permit him to moor the submarine at the pier he preferred."[7] In this manner, Chrestensen reasoned the First Amendment would shield the handbill's distribution because the protest message constituted protected speech.

This Court disagreed, holding that the intent of the handbill was clearly commercial, and thus properly subject to the city's authority to regulate publicly-owned streets. The Court's opinion contained a single sentence of great importance: "We are...clear that the Constitution imposes no...restraint on government as respects purely commercial

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[5] Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990).
[6] 316 U.S. 52 (1942).
[7] Kozinski & Banner at 627.

advertising."[8] And thus, the commercial speech doctrine was born.

Valentine's message is simple: The First Amendment cannot be used as a pretext for evading legitimate government authority. New York City has the right to govern the use of roads it owns. Chrestensen had no more right to distribute his handbills on public streets than he did to demand a newspaper run his advertising free of charge. Free speech, essentially, had nothing to do with the legal question. The *Valentine* court properly identified the two-sided handbill as an effort to circumvent the law by manufacturing a free speech issue: "If that evasion were successful, every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command."[9]

But the *Valentine* court should be recognized for what it did not say as well. It did not attempt to create a broad category of speech unprotected by the First Amendment. Such a step would have been unsupported by the facts of the case and inconsistent with existing case law. In fact, as Judge Kozinski points out, *Valentine* cites no precedent in support of its central holding regarding commercial speech.[10] This is because, *amicus* contends, the *Valentine* court was simply restating an accepted principle of the common law—that a government may exercise administrative authority over property it directly controls—rather than creating novel precedent.

b. *The subsequent evolution of the commercial speech doctrine created an unworkable standard.*

In the intervening six decades, the simple *Valentine* standard morphed into the modern commercial speech

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[8] 316 U.S. at 54.
[9] *Id.* at 55.
[10] Kozinski & Banner at 627.

doctrine. There is no single reason for this transformation. As legislatures increased their efforts to regulate private business, courts became convinced that some differentiation had to be made between "commercial" and "noncommercial" speech. Although this differentiation has no foundation in the Constitution's text or historical precedent prior to 1942, this Court nonetheless attempted to distinguish the two categories of speech.

The two key attempts at segregation came in *Central Hudson* and *Bolger*. In *Central Hudson*, the Court imposed a four-part test for analyzing regulations of commercial speech. To borrow from Justice Brown's dissent from the decision below, *Central Hudson* promised much, but solved nothing.[11] The Court first defined commercial speech as "expression related solely to the economic interest of the speaker and the speaker's audience."[12] Next, the Court held the Constitution afforded commercial speech "a lesser protection" than other forms of expression.[13] Finally, the amount of lesser protection "turns on the nature both of the expression and of the governmental interests served by its regulation.[14]

In essence, *Central Hudson* commands judges to segregate all speech into commercial and noncommercial categories, and to afford lesser protection to the latter.[15] This proved to be an impossible task, especially in light of the rapid synthesis of traditional advertising with other expressive media. The music video, Internet homepages, and even novels like Ayn Rand's *Atlas Shrugged*, are all examples of commercially-motivated acts of speech. To separate the commercial elements from the noncommercial would effectively destroy both the medium and the message.

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[11] *See Kasky v. Nike*, 45 P.3d 243, 268 (Cal. 2002) (Brown, J., dissenting).
[12] *Central Hudson*, 447 U.S. at 561.
[13] *Id.* at 563.
[14] *Id.*
[15] *See Kasky*, 45 P.3d at 268.

Bolger only makes this problem worse. The Court opens by affirming the traditional viewpoint that commercial speech is expression that "does no more than propose a commercial transaction."[16] But then *Bolger* tells us speech *may* be commercial if it meets one or more of the following tests: (1) the message is in advertising format; (2) there is a reference to a product; or (3) the speaker has an economic motive.[17] What we do not learn from *Bolger*, however, is just which of these three factors proves decisive in labeling speech commercial, thereby denying it full First Amendment protection. The Court said the presence of one of these factors is not, by itself, sufficient, but that, as in *Central Hudson*, "the nature both of the expression and of the governmental interests served"[18] must rule.

Bolger is not an objective standard, but a circular one: If the government can establish some interest in regulating expression, and it can demonstrate the presence of at least one of the three factors, than it can classify the expression as commercial speech. That is precisely what the California Supreme Court did. Relying on the government's interest in preventing fraud, the decision below classifies Nike's expression as commercial speech because it is in advertising format (at least some of it is) and Nike's motives were economic.[19] But by that logic, all corporate speech falls outside the First Amendment, since a for-profit corporation's very existence is economically motivated.

Since *amicus* believes this Court did not intend to deny First Amendment protection to *all* corporate speech, the question remained how to successfully segregate commercial speech from the noncommercial variety. But it was never clear what governmental interest is even served by such a classification. Unlike the businesses involved in

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[16] *Bolger*, 463 U.S. at 66 (quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumers Council*, 425 U.S. 748, 762 (1976)).
[17] *Id.* at 66-68.
[18] 447 U.S. at 563.
[19] *See* Pet. App. 21a-22a.

this Court's initial rulings establishing the commercial speech doctrine, Nike's business is not one traditionally targeted for industry-specific government regulation with respect to speech.[20] There is no historical evidence that suggests the California legislature was specifically concerned with an apparel manufacturer responding to criticism of its labor practices.

The simple fact that the current commercial speech doctrine has strayed from the initial "proposing a commercial transaction" standard indicates the core problem. Nike did not propose a commercial transaction in the challenged advertising, but rather influenced consumers to view the company positively. That is not the same thing, yet the California Supreme Court took the connection as a matter of common sense. It is no wonder that it did so, considering this Court's own explanation of the need for the commercial-noncommercial separation in *Ohralik v. Ohio State Bar Association*:[21]

> We have not discarded the "common-sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we

[20] *See generally Bigelow v. Virginia*, 421 U.S. 809 (1975) (discussing restrictions on lawyer advertising); *Virginia Pharmacy Bd.* (discussing restrictions on prescription drug advertising); *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996) (discussing a state ban on liquor advertising); *Central Hudson* (discussing a state ban on utility advertising.)

[21] 436 U.S. 447 (1978).

> instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.[22]

This paragraph is incoherent. It is difficult to see the "common sense" of protecting the First Amendment from "devitalization" through the existing commercial speech doctrine. Corporate speech is just as important to the realm of ideas as speech initiated by citizens, activists and public policy groups. The mere presence of a commercial motive does not "dilute" the First Amendment's intent, effect, or application.

JUSTICE THOMAS in his concurring opinion in *44 Liquormart, Inc. v. Rhode Island*,[23] expressed skepticism as to this Court's continued efforts to segregate commercial and noncommercial speech. He correctly noted: "I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than noncommercial speech."[24] This position is a far cry from *Ohralik*'s judicial hyperbole. It is also the correct position, and this Court should adopt JUSTICE THOMAS's position as a substitute for the current commercial speech doctrine of *Central Hudson* and *Bolger*.

c. *There are only two ways to resolve the current confusion: overrule the commercial speech doctrine or affirm the decision below.*

The alternative to abandoning the commercial speech doctrine is to fully embrace the California Supreme Court's

[22] *Id.* at 455-456.

[23] 517 U.S. 484, 518 (1996) (Thomas, J., concurring).

[24] *Id.* at 522.

interpretation in the case below. If commercial speech must be segregated, than the only criterion for doing so is the speaker's economic motive. While this approach toward fully segregating all commercial speech would be consistent with the practice of other democratic countries, such as the United Kingdom, applying this standard in the United States would radically alter American commerce and society. Recently, the British Government's Independent Television Commission banned the further telecast of "The Wall Street Journal Editorial Board with Stuart Varney," a current affairs discussion program produced in the United States, and initially aired in Britain on CNBC Europe.[25] In a letter to CNBC Europe, the ITC "sharply reprimanded" the network for airing the program, because British policy prohibits current affairs programming from having commercial sponsors. The Wall Street Journal was accused of sponsoring the program in order to promote sales of their print newspapers. The ITC reasoned: "The finding against CNBC Europe has nothing to do with...'the ability of a commercial TV network to exercise free speech,' but everything to do with the right of viewers to have access to news and current affairs that is, and can be seen to be, free from commercial influence."[26]

The commercial speech doctrine, if resolved in favor of the California Supreme Court's position, would authorize precisely the kind of government action taken by the British ITC. If the government takes it upon itself to purge all commercial elements from the realm of political speech, the consequences will be devastating. Witness the current debate in the United States over campaign finance reform, where a recent law banned corporate donations to political campaigns on the grounds that such donors might corrupt the political process.[27] There is not much breathing space

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[25] *Banned in Britain*, WALL ST.J., November 8, 2002, at A10.

[26] *Id.*

[27] *See generally* Publ. L. No. 107-155; H.R. REP. NO. 107-131, at 1-4 (2001).

between campaign finance laws and a ban on sponsored current affairs programming.

The only way to prevent a gradual slide towards the British concept of "free speech" is for this Court to pull itself back from the breach caused by the modern commercial speech doctrine. These are the only alternatives. Doing nothing—maintaining the status quo—will only delay this inevitable decision.

d. *The Court should reaffirm the right of individuals to engage in unshackled speech.*

On a fundamental level, there is a clear disconnect between the principle of individual rights and today's commercial speech doctrine. This problem is philosophic, reflecting the larger conflict in American culture between the principles of individualism and freedom expressed in the Declaration of Independence and animated by the Constitution, versus the modern—and now dominant—belief in collectivism and state paternalism. In accepting this case for review, the Court should ultimately reject the view that an individual who acts based on an economic motive forfeits First Amendment protections.

In maintaining the modern commercial speech doctrine, the Court has failed to recognize that human beings value their membership in society largely for the selfish economic benefits that come from trade with others. In a society that recognizes individual rights, all interactions are voluntary, based on mutual exchange by mutual agreement to mutual benefit. It is only through such a system of free and uncoerced exchange that people can properly benefit from associating with one another.

Yet in failing to protect the speech necessary to define or defend an individual's economic relationships with others, the Court has relegated self-interested speech to an intellectual ghetto. The California Supreme Court holds that

because Nike is acting out of its own economic self-interest, it ultimately has no right to submit its views to the public.

But the California Supreme Court's moral premise is unfounded and inconsistent with a system of government dedicated to protecting individual rights. One's political interests are just as selfishly motivated as one's economic interests. One cannot claim to uphold the sanctity of an individual's right to make political speeches on issues that affect him and simultaneously damn him when he publicly defends his right to make and sell a pair of shoes because that is his trade. Outside of cases of fraud or compelling government interest—which apply to all citizens, regardless of motive or economic interest—there is no legitimate justification in segregating the protections afforded political speech from those afforded to commercial speech. As far as the individual is concerned, both political and economic speech are essential to the success of one's life and one's ability to live peacefully with other men.

II. California's "Private Attorney General" Rule Violates the Guarantee Clause of the Federal Constitution.

Under Section 17204 of California's Business and Professions Code, an unfair competition claim may be initiated "by any board, officer, person, corporation or association or by any person acting for the interests of itself, its members, or the general public." The final four words of this clause, as applied in this case, violate the United States Constitution. At a minimum, this Court should remand the standing question back to the California Supreme Court.

Marc Kasky initiated the instant case against Nike without alleging any injury to himself or any direct, personal knowledge of the facts. He acted, instead, as a "private attorney general" under Section 17204, seeking injunctive relief on behalf of the general public of California. Nike did not challenge Kasky's standing to initiate this action in their

petition here, and there is no discussion of the issue in the proceedings below.

On its face, this appears to be a *qui tam* civil action. That is to say, Kasky sued Nike on behalf of himself and the state of California. The *qui tam* rule has been upheld by this Court, notably in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,[28] as sufficient to establish Article III standing. But in the instant case, Kasky cannot seek this protection, because § 17204 does not properly apply the *qui tam* rule explicated in *Stevens*.

The Court outlines the evolution of *qui tam* in *Stevens*, noting its origin in 13th Century English law: "private individuals who had suffered injury began bringing actions in the royal courts on both their own and the Crown's behalf."[29] By asserting a Crown interest, individuals could have their cases heard in the "respected" royal courts. Unlike the instant case, however, the plaintiff alleged an injury independent of any offense to the King. Beginning in the 14th Century, the royal courts expanded their jurisdiction over private cases, and this form of *qui tam* fell into disuse.[30]

Both English and American laws recognize a statutory form of *qui tam*. The *Stevens* court described two types of these statutes: "those that allow injured parties to sue in vindication of their own interests (as well as the Crown's)," and "those that allowed informers to obtain a portion of the penalty as a bounty for their information, even if they had not suffered an injury themselves."[31] These latter "informer statutes" were specifically upheld as constitutional in *Stevens*. In that case, a former employee of the Vermont Agency of Natural Resources filed a federal *qui tam* civil action alleging, based on his personal knowledge, that the agency defrauded the United States Government. While

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[28] 529 U.S. 765 (2000).
[29] *Id.* at 774.
[30] *Id.*
[31] *Id.* at 775.

Stevens did not allege an injury to himself, his direct knowledge permitted the action to proceed.

In the instant case, Kasky asserted third-party statements against Nike were true without any personal knowledge of the actual facts.[32] This hardly qualifies him to act as an "informer" under the *qui tam* rule; after all, an informer must be informed. Had the third parties Kasky cited filed suit, this discussion might well be moot, but since Kasky is the only plaintiff in the proceedings below, his standing alone is the issue. Since he's alleged neither personal injury nor personal knowledge of the facts, he cannot assert a *qui tam* claim consistent with *Stevens*.

But since Nike does not raise this issue, and the courts below did not consider this question, two possibilities emerge: (1) this Court could remand the question of *qui tam* standing back to the California Supreme Court for clarification; or (2) Sec. 17204 was not intended by the legislature to be a *qui tam* statute, but a direct grant of prosecutorial power to every individual residing in California. If the latter is true, then the statute violates the Guarantee Clause of Article IV.

The Guarantee Clause provides, in relevant part, "The United States shall guarantee to every State in this Union a Republican Form of Government."[33] As defined by the Colorado Supreme Court, "A republican form of government is one in which the supreme power rests in all the citizens entitled to vote and is exercised by representatives elected, directly or indirectly, by them and responsible to them."[34] This requirement applies not just to state legislatures, but to the executive and judicial branches as well. Even where executive or judicial officers are not directly selected, all persons exercising the state's authority are ultimately accountable to the people through the legislature. This Court has recognized the essential,

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[32] Pet. at 3-4.
[33] U.S. CONST. art. IV, § 4.
[34] *Morrissey v. Colorado*, 951 P.2d 911 (Colo. 1998).

"distinguishing" feature of republican government is the "right of the people to choose their own officers for governmental administration."[35]

The Guarantee Clause is a direct constitutional restriction on the power of the states. James Madison noted the purpose of the Guarantee Clause was to give the federal government "authority to defend the system against aristocratic or monarchial innovations."[36] In plainer terms, a state is free to adopt its own organization of government, but it may not "exchange republican for anti-republican Constitutions."[37]

While the Guarantee Clause forbids the states from establishing a monarchy, it also precludes them from implementing anarchy. A republic grants a monopoly of the lawful use of force to representative bodies and agents. Section 17204, in contrast, grants that same monopoly to every individual, corporation, and association that happens to maintain a California address. This creates, to borrow from this Court's commercial speech reasoning, a dilution and devitalization of the state's executive power. California cannot, under the color of republican government, designate more than thirty million individuals to act as private attorneys general. Doing so places every business within the state at the whim of individuals—motivated by nothing more than animus—who can file suit under the state's prosecutorial authority. This goes beyond even the abuse of *qui tam* informer suits acknowledged by the *Stevens* court.[38]

This Court has been appropriately reluctant to invoke the Guarantee Clause as grounds for asserting the judicial power. But unlike prior cases where the Court held Guarantee Clause claims to be nonjusticiable political

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[35] *In re Duncan*, 139 U.S. 449 (1891).
[36] THE FEDERALIST NO. 43 (James Madison).
[37] *Id.*
[38] 529 U.S. at 775.

questions,[39] this case does not involve such a question. The issue here does not address how California apportioned prosecutorial power among its own agencies, nor does it raise any separation of power matters. The only question is whether the state can assign prosecutorial power to individuals not accountable to the state or the people generally.

State courts have invoked the Guarantee Clause when the accountability line has been crossed. In *Morrissey v. Colorado*, the Colorado Supreme Court voided a referendum requiring state legislators and federal representatives to support a specific amendment to the United States Constitution. The court held, in part, that the referendum violated the Guarantee Clause "because it takes away from elected officials the right to exercise their own judgment and vote the best interests of their constituencies as they perceive them."[40] Just as Colorado legislators must be free to exercise judgment over legislative matters, California's elected and appointed prosecutors must exercise judgment over how to initiate state action in civil matters where there is no concurrent private cause of action.

The issue is accountability. Even where civil enforcement is delegated by a state to an appointed official or agency, the legislature retains ultimate authority to direct state action, either through direct legislation or the almighty power of the purse—appropriations. The same is true of local district attorneys, who are both elected by the people they serve and accountable for their operating budgets. Kasky, in contrast, is politically and financially accountable to nobody. He is using the façade of state action to mask what is, at its core, a private grievance with Nike that has no basis in fact or law. Review by this court of Kasky's standing is warranted to ensure, at a minimum, that § 17204 is not

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[39] *See Ohio ex rel. Bryant v. Akron Metropolitan Dist.*, 281 U.S. 74 (1930); *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930).
[40] *Morrissey*, 951 P.2d at 917.

fatally flawed with respect to Article III or the Guarantee Clause of Article IV.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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